No. 92-1469

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

BARBARA MARTIN ELLIOTT,

Petitioner

v.

FAE A. MORELAND, INDIVIDUALLY AND AS COUNTY CLERK OF WASHINGTON COUNTY, OKLAHOMA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

David W. Lee
David W. Lee, P.C.
818 N.W. 63rd Street
Suite 100
Oklahoma City, OK 73116

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

QUESTIONS PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD NOT BE GRANTED 7

CONCLUSION 23

TABLE OF AUTHORITIES

FEDERAL CASES

A.E. v. Mitchell,
724 F.2d 864 (10th Cir. 1984) 11

Abbitt v. Franklin,
731 F.2d 661 (10th Cir. 1984) 3

Amendola v. Bayer,
907 F.2d 760 (7th Cir. 1990) 16

Berger v. Edgewater Steel Co.,
911 F.2d 911 (3d Cir. 1990) 16

Brown v. Hartshorne Public School District No. 1,
926 F.2d 959 (10th Cir. 1991). . . . 5, 8

Chesnut v. St. Louis County, Mo.,
656 F.2d 343 (8th Cir. 1981) 20

Dussouy v. Gulf Coast Inv. Corp.,
660 F.2d 594 (5th Cir. 1981) . . . 17, 18, 19

First City Bank v. Air Capitol Aircraft Sales,
820 F.2d 1127 (10th Cir. 1987) 10

Foman v. Davis,
373 U.S. 178 (1962) 14, 21, 23

Hurn v. Retirement Fund Trust of Plumbing, Etc.,
648 F.2d 1252 (9th Cir. 1981) . . 20, 21

Las Vegas Ice and Cold Storage Co. v. Far West Bank,
893 F.2d 1182 (10th Cir. 1990) 11

Oxford Furniture v. Drexel Heritage Furnishings,
984 F.2d 1119 (11th Cir. 1993) 15

Quaker State Oil Refining v.Garrity Oil Co.,
884 F.2d 1510 (1st Cir. 1989). . . 15, 16

Tefft v. Seward,
689 F.2d 637 (6th Cir. 1982) . . 19, 20

Triplett v. LaFlore County,
712 F.2d 444 (10th Cir. 1983) 10

Woolsey v. Marion Laboratories, Inc.,
934 F.2d 1452 (10th Cir. 1987) 11

Yellow Bus Lines, Inc. v. Local Union 639,
883 F.2d 132 (D.C. Cir. 1989) . . 21, 22

FEDERAL STATUTES AND REGULATIONS

29 U.S.C. § 794 6

42 U.S.C. §1983 3

Fed. R. Civ. P. 15(a) 11, 14

Fed. R. Civ. P. 41(b) 1, 7

STATE STATUTES AND RULES

Okla. Stat. Ann. tit. 12, §100
(West 1988) 5, 8

U.S. Dist. Ct. Rules, N.D. Okla. Rule 15(A) 3

TREATISES

6 Charles A. Wright, Arthur R. Miller, & Richard Kane, Federal Practice and Procedure, § 1488 at 659 (1990) 11

QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court abused its discretion when it denied the Petitioner's Motion for Leave to File an Amended Complaint.

2. Whether the district court abused its discretion when it held, on alternative grounds, that the Petitioner's Complaint should have been dismissed under Fed. R. Civ. P. 41(b) for failure to prosecute.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

BARBARA MARTIN ELLIOTT, Petitioner,	)	
vs.	)	Case No. 92-1469
FAE A. MORELAND, Respondent.	)	

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Petitioner ("Elliott") was an employee of the Washington County, Oklahoma, County Clerk's Office until her discharge by the Respondent, ("Moreland"), the County Clerk, on December 31, 1987. In her complaint, Elliott contended that certain acts of Moreland, including her discharge of Elliott, violated Elliott's rights under the First and Fourteenth Amendments to the United

States Constitution.[1] The Complaint, which was an action brought pursuant to 42 U.S.C. § 1983, was filed on December 4, 1989, the same month the two year statute of limitations would have run. See Abbitt v. Franklin, 731 F.2d 661 (10th Cir. 1984) (en banc) (under Oklahoma law, two year statute of limitations applies for civil rights actions).

On January 10, 1990, Moreland filed a motion and brief to dismiss the complaint. Elliott filed no response, despite the fact that one is required by the local court rules to be filed within fifteen days of the original motion. U.S. Dist. Ct. Rules, N.D. Okla. Rule 15(A).

---

[1]In her original complaint, Elliott's allegations under federal law were that her First Amendment rights had been violated by discrimination against her on the basis of her handicap, and that her property interests under the Fourteenth Amendment had been violated. Elliott also alleged violations of state tort law in two counts of the complaint.

The case was then set for status/scheduling conference on March 28, 1990, at 3:50 p.m. in Tulsa, Oklahoma. The attorney for Moreland drove from Oklahoma City, and his co-counsel drove from Bartlesville for this conference. Elliott's attorney failed to appear at the conference. At the time of the conference, Elliott still had not responded to Moreland's Motion to Dismiss, which was filed over two months before the hearing.

After Elliott's nonappearance at the status conference, the district court specifically ordered her to respond to Moreland's Motion to Dismiss, ordered discovery to be completed by June 29, 1990, and set the case for another status conference on July 2, 1990, at 1:15 p.m.

Elliott still did not respond to Moreland's Motion to Dismiss. Finally, on May

18, 1990, Moreland filed a motion and brief requesting the district court to determine that Elliott had waived her objection to the Motion to Dismiss, or, in the alternative, for an order staying discovery until the Motion to Dismiss had been ruled on. Elliott did not respond to this motion, and still failed to respond to the original motion to dismiss. On June 6, 1990, the district court entered its order dismissing the case.

On June 6, 1991, one full calendar year after the case was dismissed, Elliott filed a motion and brief for leave to file an amended complaint.[2] The proposed amended complaint set forth a new set of theories under federal

---

[2]This would have been on the last day before the statute of limitations would have run, since Oklahoma's savings clause gave Elliott an additional year after the dismissal to file an amended complaint. See Okla. Stat. Ann. tit. 12, § 100 (West 1988); Brown v. Hartshorne Public School District No. 1, 926 F.2d 959, 961 (10th Cir. 1991).

law as to why she was entitled to relief. For the first time, Elliott contended that her rights under the Rehabilitation Act, 29 U.S.C. § 794, had been violated. She also claimed that her First Amendment rights had been violated because she had been discharged for disclosing Moreland's discriminatory acts to the Oklahoma Human Rights Commission. In her Brief in Support of Motion for Leave to Amend, Elliott essentially conceded that her original contentions regarding First and Fourteenth Amendment violations were meritless, and did not reassert these claims. Elliott offered no explanation as to why the Rehabilitation Act claims were not presented in the original complaint.

Moreland opposed the filing of the proposed Amended Complaint on the ground that such had not been timely pursued. On December 5, 1991, the district court, citing the

actions of Elliott noted above, entered its order denying Elliott's Motion for Leave to File the Amended Complaint, and noted that it also would have dismissed the action pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute.

Elliott appealed the dismissal, and on December 8, 1992, the United States Court of Appeals for the Tenth Circuit, in an unpublished order and judgment, affirmed the district court's dismissal.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

THERE WAS NO ABUSE OF DISCRETION BY THE DISTRICT COURT WHEN IT REFUSED TO ALLOW ELLIOTT TO FILE THE AMENDED COMPLAINT, BECAUSE ELLIOTT HAS OFFERED NO EXPLANATION FOR THE EXCESSIVE DELAY IN REQUESTING LEAVE TO FILE THE AMENDED COMPLAINT; FURTHERMORE THE TENTH CIRCUIT'S RULING IS CONSISTENT WITH THAT OF OTHER COURTS OF APPEAL.

In the present case, the district court denied Elliott's Motion for Leave to File an Amended Complaint, which was filed on July 6,

1991, an entire calendar year after the court had previously dismissed her Complaint on June 6, 1990.[3] The history of this case was one of refusal to comply with the district court's orders, and abuse of the legal system and of Moreland. In its two orders, the district court outlined the relevant facts constituting the abuse.

Elliott claims that the district court erred by dismissing the federal claims involving counts one and three of the complaint with prejudice in its June 6, 1990, order. However, the order states only that counts one and three were dismissed; the court dismissed counts 2 and 4 without prejudice.

---

[3]As noted previously, the motion for leave to amend was filed on the last day before the statute of limitations was to run, with Elliott apparently relying on the one year savings clause in Okla. Stat. Ann. tit. 12, § 100 (West 1988). See Brown v. Hartshorne Public School District No. 1, 926 F.2d 959, 961 (10th Cir. 1991).

Therefore, Elliott was free at any time to ask for leave of court to add the new claims she eventually added to her proposed Amended Complaint.

Furthermore, for the reasons pointed out in the district court's order, the claims in counts one and three of the original Complaint were essentially frivolous; one was based on alleged violation of freedom of speech under the First Amendment because of discrimination based on Elliott's handicap, and the other was for an alleged violation of her property interest under the Fourteenth Amendment, a claim made without any factual allegations. Significantly, Elliott does not claim in this appeal that the district court erred by dismissing the Complaint with regard to the substance of those two counts, nor does she ask this court to allow her to amend her Complaint to clarify these issues in an

Amended Complaint.

Therefore, the issue is whether the district court erred in refusing leave to amend after the one year passage of time, and after the repeated failure of Elliott to comply with court orders or local rules. In First City Bank v. Air Capitol Aircraft Sales, 820 F.2d 1127, 1132 (10th Cir. 1987), the court stated that there is no abuse of discretion to refuse to permit leave to amend if the district court relies on a reason such as undue delay, bad faith, or a dilatory motive on the part of the movant. See also Triplett v. LaFlore County, 712 F.2d 444, 446 (10th Cir. 1983) (undue delay can be the reason for refusal to grant leave to amend).

In First City Bank, 820 F.2d at 1133, the court noted that prejudice to the opposing party need not be shown, and that a district court acts within the bounds of its discretion

when it denies leave to amend for "untimeliness" or "undue delay." See also Woolsey v. Marion Laboratories, Inc., 934 F.2d 1452, 1462 (10th Cir. 1987) (while prejudice may be one ground justifying a denial of leave to amend, such a showing is not necessary); Las Vegas Ice and Cold Storage Co. v. Far West Bank, 893 F.2d 1182, 1185 (10th Cir. 1990) ("Untimeliness alone may be a sufficient basis for denial of leave to amend."); and A.E. v. Mitchell, 724 F.2d 864, 868-89 (10th Cir. 1984) (where district court filed order denying injunctive relief in June 1980, and plaintiffs did not seek leave to amend their complaint until May, 1981, no abuse of discretion in refusing leave to amend).

In 6 Charles A. Wright, Arthur R. Miller, & Richard Kane, Federal Practice and Procedure, § 1488 at 659 (1990), it is stated:

> Nonetheless, in keeping with the purpose of Rule

> 15(a), which is to facilitate a determination of action on the merits, a motion to amend should be made as soon as the necessity for altering the pleading becomes apparent. A party who delays seeking an amendment is acting contrary to the spirit of the rule and runs the risk of the court denying permission because of the passage of time.

(footnote omitted).

This treatise also notes that the moving party's failure to include the proposed amendment in its original pleading may put the opposing party to the added burden of further expense, "thereby prejudicing his right to a speedy and inexpensive trial on the merits." Id. at 673-74. Professor Wright's treatise also states that the decision whether to permit leave to amend may depend on the reason or the basis for the inaction, and leave will be granted if the party seeking such

demonstrates that the delay was not excessive or excusable. Id. at 678-82. Furthermore, the court may deny leave to amend when the "moving party knew about the facts on which the proposed amendment was based but omitted the necessary allegations from the original pleadings." (footnote omitted). Id. at 682-88.

In the present case, Elliott gave the district court no acceptable reason why she had been so dilatory in presenting the claims in the proposed Amended Complaint in a timely fashion. She only made vague references to "an extreme workload and conflicting court schedules." In her brief filed with this court, Elliott gave the same reason for the inaction.

Moreland, a public servant who obviously was distracted from her duties by the inexcusable and inadequately explained neglect

by Elliott, contends that there was a blatant abuse of the district court's resources, and a waste of money in defending the lawsuit.[4]

In Foman v. Davis, 373 U.S. 178, 182 (1962), this Court set forth that the justifications for motions to amend under Fed. R. Civ. P. 15(a) were undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party and futility of amendment. In following the opinion of this Court and ruling that undue delay alone is sufficient to justify leave to amend, the Tenth Circuit Court of Appeals is consistent with the decisions of other courts of appeals in their interpretation of Fed. R. Civ. P. 15(a).

---

[4]Ms. Moreland retired from her position as County Clerk of Washington County in December, 1991.

The Eleventh Circuit court of appeals has also issued an opinion consistent with the Tenth Circuit. In Oxford Furniture v. Drexel Heritage Furnishings, 984 F.2d 1119, 1124 (11th Cir. 1993), the court of appeals for the Eleventh Circuit ruled that the district court did not abuse its discretion in denying the defendant's motion to amend its answer. The court stated that the defendant gave no reason for waiting to raise the statute of frauds defense ten months after the plaintiff's complaint and seven days before the pretrial conference. Id. See also Quaker State Oil Refining v.Garrity Oil Co., 884 F.2d 1510, 1517-18 (1st Cir. 1989) (court of appeals upheld district court's denial of amendment noting that the movant's tardiness was extreme and stating that "[p]arties seeking the benefit of the rule's liberality have an obligation to exercise due diligence."). In

Quaker State, the court also stated that "[t]he facts upon which the proposed counterclaim rested were known to [movant] all along . . . " and "[m]ost important, [movant] never proffered a satisfactory explanation for its delay." Id. In Berger v. Edgewater Steel Co., 911 F.2d 911, 924 (3d Cir. 1990), the court held that the district court did not abuse its discretion in denying the motion, when amendment would bring new issues into the case and it came four and one-half months after the information on which it was based became available and after the close of an extended discovery period; See also Amendola v. Bayer, 907 F.2d 760, 764 (7th Cir. 1990) (district court did not abuse its discretion in denying motion to amend where movant's delay in his attempt to amend was inexcusable and discovery had been conducted for over 19 months and he failed to tender any reason for

his failure to seek leave to amend).

In her Petition for Writ of Certiorari, the Petitioner relies on opinions from the Fifth, Sixth, Eighth, and Ninth Circuit Courts of Appeals, as well as the District of Columbia. The facts in each of these opinions reveal that the courts' decisions to deny leave to amend are consistent with the opinions enunciated by the Tenth Circuit.

In Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594 (5th Cir. 1981), the court decided that there was no substantial reason to deny leave to amend. Id. at 598. The cause of action in Dussouy was based on conspiracy. The plaintiff voluntarily dismissed one of the defendants as a party unnecessary to the lawsuit and 41 days after entry of the dismissal moved to amend his complaint. Id. at 599. The court of appeals viewed the voluntary dismissal as the factor that

necessitated the amendment, and found the delay reasonable based on these circumstances. Id. The court noted that the deficiencies that were cured with the plaintiff's second amendment stemmed from the voluntary dismissal, and that the remaining defendant would not be prejudiced by the amendment because the challenged conduct was essentially the same as that challenged in the initial pleadings. Id. The court in Dussouy stated that "[i]n other circumstances, awareness of facts and failure to include them in the complaint might give rise to the inference that the plaintiff was engaging in tactical maneuvers to force the court to consider various theories seriatim. In such a case . . . denial of leave to amend on the grounds of bad faith may be appropriate." Id. The court also stated that denial of leave to amend is appropriate when failure to include a known

theory is not from an attempt to gain tactical advantage but from a reasonable belief that the theory is unnecessary. Id.

In Tefft v. Seward, 689 F.2d 637, 639 (6th Cir. 1982), the original complaint was filed on January 28, 1976. In late 1980, the plaintiff moved to amend his complaint to allege a cause of action based on a constitutional tort instead of assault and battery. The court of appeals held that there was no particular "undue" delay considering the course of the case through a prior appeal to the Sixth Circuit. Id. The court based its decision on the theory that the plaintiff should have been granted leave to amend his complaint because his original attempt to amend was plain from the language in his response to the defendants' motion for summary judgment, and the facts set forth in the original complaint would support a cause of

action for a constitutional tort as well as assault and battery. Id.

In Chesnut v. St. Louis County, Mo., 656 F.2d 343, 349 (8th Cir. 1981), the Eighth Circuit Court of Appeals ruled that the district court should have allowed the plaintiff's motion for leave to amend the complaint to add a party plaintiff. In so ruling, the court noted that the motion was made simultaneously with the plaintiff's cross motion for summary judgment and at that time, granting the motion would not have prejudiced the defendant. Id. The court also addressed that the defendant had supported some of its pleadings and motions prior to that point in the case assuming the party to be added was already a party, and that at no time did the defendant resist the motion for leave to amend. Id.

In Hurn v. Retirement Fund Trust of

Plumbing, Etc., 648 F.2d 1252 (9th Cir. 1981), the court of appeals stated that the district court did not provide a statement of reasons justifying the denial and no reason readily apparent on the record justified the district court's denial of amendment over two years after the original complaint was filed. Id. at 1254. The court stated that there was no prejudice because the operative facts remained the same. Id. In Yellow Bus Lines, Inc. v. Local Union 639, 883 F.2d 132 (D.C. Cir. 1989), the court ruled that none of the reasons recognized in Foman justified denial of the plaintiff's motion to amend. The court stated that only two months elapsed between the hearing at which the court first expressed doubts about the deficiencies of the original pleading and the plaintiff's request to amend those pleadings. Id. at 145. The court also recognized that the trial was more than eight

months away, and that the plaintiff moved with more than reasonable alacrity to correct its pleadings and ample time was available to the defendants for trial preparation. Id.

In each of the opinions relied upon by the Petitioner in the present case, the courts of appeals found that leave to amend should have been granted reasoning that the movants had either already attempted an amendment, made the amendment simultaneously with another pleading, or the plaintiff voluntarily dismissed a defendant which necessitated the amendment, and in one case, there was no resistance from the nonmovant. The facts of these cases are distinguishable from the present case making the rulings of these circuits consistent with the decisions of the Tenth Circuit. In the present case, not only did the Petitioner wait until one year after the dismissal of her case, but prior to that

time she did not respond to the Respondents' Motion to Dismiss. Also, the Petitioner failed to follow the district court's orders. The Tenth Circuit and the district court were correct in deciding that the Petitioner's Motion to Amend was justifiably denied based upon undue delay as set forth in Foman v. Davis, 373 U.S. 178, 182 (1962).

CONCLUSION

Moreland contends that the Tenth Circuit opinion is consistent with that of other courts of appeals, the district court did not abuse its discretion by refusing to grant Elliott's Request to File an Amended Complaint, and asks this Court to deny Elliott's Petition.

Respectfully submitted,

David W. Lee
DAVID W. LEE, P.C.
818 N.W. 63rd Street
Suite 100
Oklahoma City, OK 73116
(405) 848-1983

ATTORNEY FOR RESPONDENT

Elliott\0393res1.dwl